Supreme Court, U.S.
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No. 02-1646

In The
Supreme Court of the United States

THE HIGBEE COMPANY, d/b/a
DILLARD DEPARTMENT STORES, INC.,

Petitioner,

v.

LYNETTE CHAPMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

On October 6, 2003, the Court invited the Solicitor General to express the views of the United States on the Higbee Company d/b/a Dillard Department Stores, Inc. ("Dillard's") Petition for a Writ of Certiorari. The Solicitor finally filed a brief on May 28, 2004. The vast majority of the Solicitor's brief is given over to arguing that the decision below was correct. It largely ignores the question of whether the proper scope of the "full and equal benefit" clause of 42 U.S.C. § 1981(a) is an important one and omits entirely any mention of the second question Dillard's presented in its petition for a writ of certiorari – " . . . the proper scope of the 'full and equal benefit' clause of 42 U.S.C. § 1981(a)."

While ignoring the question of whether the proper scope of the "full and equal benefit" clause warrants review by the Court, the Government concedes in its Amicus Curiae Brief ("Amicus") that "the courts of appeals have issued conflicting decisions" on the need for state action under that clause. (Amicus 7). However, the Government asserts that the Court should not resolve this conflict among the courts of appeals because it argues: (1) the decision below is correct (Amicus 8); (2) the conflict among five courts of appeals as to the scope of the "full and equal benefit clause" "is not sufficiently developed to warrant the Court's review" (Amicus 16); and (3) the Court's ruling on Chapman's claim under a different statute somehow prevents review here. (Amicus 19).

None of those arguments is persuasive, and none changes the central fact that the Third, Fourth, and Eighth Circuits have held that the "full and equal benefit

clause" does not apply to private actors, and the Second and Sixth Circuits have held that it does, without providing any practical guidance as to how "full and equal benefit clause" applies to private actors. Even if the Government were correct that the "full and equal benefit" clause applies to private actors, the lack of any guidance as to the how that clause applies to those actors would still deserve the Court's attention.

A. The Decision Below Is Incorrect And Misreads The Statute And Its Legislative History

The Government devotes most of its brief (Amicus 8 – 15) to arguing how the decision below might be correct. The Government's argument does not show that there is no conflict among the courts of appeals or that all of these courts no longer require state action for a claim under the "full and equal benefit" clause. The Government's belief that the decision below was correct does not and cannot resolve the conflict among the courts of appeals. Only this Court can do that.

The Government argues, as did Chapman, that the plain language of Section 1981(c) required the result below. But Section 1981(c) is ambiguous; it does not define which "rights" it covers, nor does it indicate whether it refers back to subsection (a) or subsection (b) of the amended Section 1981. And the literal language of Section 1981(a) appears to include as a "right" only the "right . . . to make and enforce contracts," "to sue," "be parties," and "give evidence." Indeed, the Court has *not* included the "full and equal benefit" clause in its enumeration of the rights protected by Section 1981. *Patterson v. McLean Credit Union*, 491 U.S. 164, 178 (1989). *See also, Runyon*

v. McCrary, 427 U.S. 160, 195 n. 5 (1976) (White, J., dissenting). Thus, it is far from clear that the "full and equal benefit clause" is one of the "rights" protected by Section 1981(a), much less one of the "rights" covered by Section 1981(c).

The Government argues that construing the "full and equal benefit" clause to apply to private actors poses no problems, citing the construction afforded 42 U.S.C. Section 1985(3) in *Griffin v. Breckenridge*, 403 U.S. 88 (1971). (Amicus 10-11). More recently, however, the Court has recognized "the constitutional shoals that would lie in the path of interpreting Section 1985(3) as a general federal tort law." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993). There is no need to even approach those shoals here, because the literal language of Section 1985(3), unlike the "full and equal benefit" clause, expressly contemplates private action. Finally, other courts have observed that the perplexing structure of Section 1985(3) limits its usefulness as a model in construing other statutes. *Stevens v. Tillman*, 855 F.2d 394, 403 (7th Cir. 1988) (noting that "[t]his statute addresses private acts – going 'in disguise on the highway' is a reference to the M.O. of the Ku Klux Klan – yet condemns only deeds that 'deprive' the victim of the 'equal protection of the laws, or of equal privileges and immunities under the law,' something within the domain of government exclusively. This admixture of private and public action has befuddled courts ever since.").

The Government attempts to get around the fact that Section 1981(a) also provides that all persons "shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other" by arguing that "[i]t requires no strain of the imagination to

identify private entities, such as schools, that impose 'punishment' on individuals." (Amicus 11). Not only does this argument illustrate the potentially unlimited applicability of the "full and equal benefit" clause if it is held to apply to private actors, it still does not resolve the interpretive difficulties that would follow from holding that Section 1981(c) applies to private actors. Not even the Government suggests that private entities impose "taxes," and if portions of Section 1981(a) do refer entirely to state action, it is simply not possible to read Section 1981(c) as the Solicitor insists it must be read – as protecting *all* rights mentioned in Section 1981(a) against private as well as public discrimination.

In an attempt to explain why the "full and equal benefit" clause applies to private actors, the Government notes that the clause refers to the "full and equal benefit of all laws and proceedings for the security of persons and property," and suggests that "private entities can establish 'proceedings' to protect the safety and security of individuals." (Amicus 11, n. 2). If instituting a work rule prohibiting strip searches is, as the Government suggests, sufficient to bring a private entity within the ambit of the "full and equal benefit" clause, the potential for new litigation under that clause is truly unlimited.

The Government also attempts to minimize the legislative history, which shows that Section 1981(c) was intended to codify *Runyon v. McCrary*, 427 U.S. 160 (1976), not to overturn the many decisions requiring state action for claims under the "full and equal benefit" clause.

(Amicus 12-13).[1] While claiming that this legislative history is "ambiguous" (Amicus 13), the Government ignores cases holding that Section 1981(c) was intended *solely* to codify *Runyon* and to prohibit discrimination in private, as well as public, contracting. *See, e.g., Dennis v. County of Fairfax*, 55 F.3d 151, 156, n. 1 (4th Cir. 1995) ("[S]ubsection (c) did not purport to overrule [the holding in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989)] with respect to municipal liability but only to codify *Runyon v. McCrary*"). The Government also ignores the title of the Civil Rights Act of 1991: "Restoring Prohibition Against All Racial Discrimination *in the Making and Enforcement of Contracts*." H. R. Rep. No. 102-40(II), at 35 (emphasis added). Also absent from the Solicitor's brief is any recognition that, prior to the enactment of Section 1981(c), every court of appeals and the majority of all federal courts to have considered the issue had held that the "full and equal benefit clause" requires state action.

Finally, the Government dismisses Dillard's concerns about interpreting the "full and equal benefit" clause in such a way as to federalize tort law as a "policy argument."

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[1] Nor does the legislative history of the Civil Rights Act of 1866, which first codified what became the "full and equal benefit" clause of Section 1981(a), support the Government's arguments. That Act was not intended to be a broad prohibition against racial discrimination by private actors, but was focused on state discrimination against the newly freed slaves. In 1866 "Congress intended to protect a limited category of rights." *Georgia v. Rachel*, 384 U.S. 780, 791-92 (1966). In fact, the portions of the bill that contained a general prohibition against discrimination were deleted in the House to secure passage. *Id. See Cong. Globe*, 39th Cong., 1st Sess., 1366 (1866). *See also* Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 11-29 (1955).

(Amicus 13). It is more than that; a desire to avoid federalizing tort law is more in the nature of a rule of construction, grounded in a concern for the federalism that lies at the heart of the Constitution. For that reason, the Court has repeatedly cautioned against interpreting Section 1981 and other early civil rights statutes to create a general federal tort law. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989); *Bray v. Alexandria Woman's Health Clinic*, 506 U.S. 263, 268 (1993). As Justice Kennedy observed in his concurring opinion in *Bray*, "as all recognize, essential considerations of federalism are at stake here. The federal balance is a fragile one, and a false step in interpreting § 1985(3) risks making a whole category of ordinary state crimes a concurrent violation of a single Congressional statute passed more than a century ago." 506 U.S. at 287.

The Government argues that the dismissal of many claims under the "full and equal benefit" clause shows that Dillard's concerns about federalizing tort law are overblown. (Amicus 14-15, citing Pet. 19). But these cases were dismissed precisely *because* they were being brought against private actors, the very limitation the Government wishes to eliminate. The Government argues that Section 1981's requirement of "intentional discrimination on the basis of race" (Amicus 14) will severely limit the number of cases that will be brought under the "full and equal benefit" clause, ignoring the fact that thousands of suits making just such allegations are filed each year in the employment context. The Government also ignores the fact that the courts have yet to develop *any* guidance, much less limits, concerning claims that may be brought against private actors under the "full and equal benefit" clause. The Second Circuit, while agreeing with the Government

that the "full and equal benefit" clause applies to private actors, did not "attempt to define the universe of laws and proceedings for the security of persons and property, believing this task best resolved case by case." *Phillip v. University of Rochester*, 316 F.3d 291, 298 (2d Cir. 2003).

B. The Division Among The Courts Of Appeals As To Whether Claims Under The "Full And Equal Benefit" Clause Of Section 1981 Require State Action Represents A True Conflict

The Government argues that conflict among the courts of appeals over whether the "full and equal benefit" clause applies to private entities is "shallow" (Amicus 1), but the very length of the Government's description of the conflict (Amicus 16-18) belies any claim that it is "shallow."

The Government argues that the Eighth Circuit failed to consider the impact of the enactment of subsection (c) to Section 1981. However, in both *Adams v. Boy Scouts of America-Chickasaw Council*, 271 F.3d 769 (8th Cir. 2001), and *Youngblood v. Hy-Vee Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), the Eighth Circuit cited the panel decision in *Chapman v. The Higbee Co.*, 256 F.3d 416 (6th Cir.), *vacated*, 270 F.3d 297 (6th Cir. 2001), in concluding that "because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law." *Adams*, 271 F.3d at 777; *Youngblood*, 266 F.3d at 855. The Second Circuit, while declining to follow the panel decision in *Chapman*, recognized that "*Chapman* contains a lengthy analysis of the state action issue" and discussed the panel decision at length "because the *Chapman* majority arguments coincide with the defendants' arguments and were adopted by reference in *Youngblood*." 316 F.3d at 296.

The Government's attempts to dismiss the Third Circuit's holdings in *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), and *Brown v. Philip Morris, Inc.*, 250 F.3d 789 (2001), as "dicta" are similarly unavailing. *Brown* merely underscores the continuing vitality of *Mahone*, which not only contains a lengthy analysis of why the "full and equal benefit" clause requires state action but has been cited by virtually every case to consider this issue, even by the courts disagreeing with *Mahone's* analysis.

C. The Sixth Circuit's Decision On Chapman's Section 1983 Claim Has No Bearing On This Matter

The Government's final argument is that, because the Sixth Circuit found that there was a genuine issue of material fact as to whether Dillard's acted under color of state law, Dillard's appeal is somehow "interlocutory." (Amicus 19). What the Government neglects to mention is that the Sixth Circuit found that there was a genuine issue of material fact with respect to Chapman's putative claim under 42 U.S.C. Section 1983 and *not* with respect to her Section 1981 claim. 319 F.3d at 834, 843. Pet. App. 17-18, 34.

The majority in *Chapman never* considered whether Dillard's was engaged in state action for purposes of the "full and equal benefit" clause of Section 1981, and Judge Suhrheinrich's dissenting opinion, while agreeing with the majority's analysis of Chapman's putative Section 1983 claims, expressly noted that "I would hold that Chapman failed to state a cognizable § 1981 claim because the alleged private discrimination she suffered is *not within the purview* of the equal benefit clause" 319 F.3d 843. Pet. App. 34 (Emphasis added). Thus, both the majority (which

never discussed the state action issue with respect to Chapman's Section 1981 claim) and the dissent (which indicated that the discrimination alleged by Chapman was outside the scope of the "full and equal benefit" clause) regarded the question of whether the "full and equal benefit" clause applied to private action as outcome determinative with respect to Chapman's Section 1981 claim. The Court should grant this petition to answer the question of whether the "full and equal benefit" clause requires state action and also to create a uniform standard as to the meaning of that clause.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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